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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1244

EDDIE ROCCO,

Petitioner,

vs.

LIFE MAGAZINE, TIME, INC., MIKE DURHAM, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California and the District Court of Appeal, Second Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Time, Inc. and Mike Durham respectfully oppose the petition for a writ of certiorari on the ground that the petition presents no substantial federal question.

Opinions Below

On November 22, 1966 the California District Court of Appeal denied petitioner's request to be relieved from the default occasioned by his failure to pay timely for the reporter's and clerk's transcripts. The District Court of Appeal accordingly dismissed petitioner's appeal. The

California Supreme Court denied his petition for a hearing on January 20, 1967. No opinion was made by either court and neither ruling is reported.

Jurisdiction

Petition for a writ of certiorari was filed on April 7, 1967. The jurisdiction of this Court is sought to be invoked under Section 1257(3) of the Judicial Code [28 U.S.C. 1257(3)], but, as will appear from the argument which follows, the claimed federal right is not timely presented.

Question Presented

The sole question presented by the petition is whether California courts may dismiss an appeal when the appellant fails to perform acts prerequisite to its prosecution under the applicable rules of court.

Rules Involved

This case involves Rules 4, 5, 7, 10 and 45 of the California Rules of Court, adopted pursuant to Section 961 of the California Code of Civil Procedure. They are printed in Appendix A hereto.

Statement

Judgment in the Superior Court of the State of California for the County of Los Angeles was entered in favor of respondents and against petitioner on January 13, 1966. The court's Memorandum Opinion and the Findings of Fact and Conclusions of Law made in connection with said judgment are printed in Appendix B

hereto. Notice of appeal was filed January 31, 1966. Notice of the costs for preparation of the clerk's transcript was mailed to petitioner's attorney on March 9, 1966, and a letter estimating the cost for preparation of the reporter's transcript was mailed to petitioner's attorney on March 14, 1966. Petitioner at no time made arrangements for the payment of these costs.

On March 23, 1966, petitioner filed in the Superior Court a Motion for Order Dispensing with the Prepayment of Costs for Preparation of Clerk's and Reporter's Transcripts on Appeal. After briefing and oral argument, petitioner's motion was denied on April 1, 1966. Petitioner's attorneys withdrew from the case shortly thereafter. On June 10, 1966, petitioner moved the District Court of Appeal, Second Appellate District, in propria persona, for an Order of Waiver of Prepayment of Clerk's and Reporter's Transcripts on Appeal. Said motion was denied by the court on June 20, 1966. Petitioner thereafter, on July 1, 1966, petitioned the California Supreme Court for a hearing; said petition was denied August 17, 1966. Petitioner did not seek review of that order by this Court.

On October 18, 1966, respondents noticed a Motion to Dismiss Appeal in the District Court of Appeal. On November 16, 1966, petitioner filed a brief in opposition to respondents' Motion to Dismiss and applied for relief from his default in failing to comply with the rules of court setting forth procedures for payment of the cost of the clerk's and reporter's transcripts. At the same time he offered to pay for both transcripts within five days. On November 22, 1966, the District Court of Appeal,

after hearing arguments on both matters, denied petitioner's application for relief from default and granted respondents' Motion to Dismiss Appeal. On January 4, 1967, petitioner petitioned the California Supreme Court for a hearing with respect to the dismissal of his appeal; said petition was denied on January 20, 1967.

Argument

I. DISMISSAL OF PETITIONER'S APPEAL WAS ENTIRELY PROPER AND RAISES NO FEDERAL QUESTION.

In the court below, petitioner's appeal was dismissed because of his failure to make timely arrangements for payment of applicable costs. Petitioner does not argue, nor could he, that the provisions of the California Rules of Court authorizing dismissal in such instances are unconstitutional, and this case therefore does not present any question of federal law. Moreover, the dismissal of petitioner's appeal was clearly correct.

Under Rules 4(c) and 5(c) of the California Rules of Court, which are printed in Appendix A hereto (pp. 11-12, 15), a notice of appeal is ineffective for any purpose unless within ten days after notice from the clerk of the estimated costs of preparing the reporter's and clerk's transcripts, appellant makes arrangement for the payment thereof. Rule 10(a) of the California Rules of Court, paralleling Rule 73(a) of the Federal Rules of Civil Procedure, provides in part:

> "If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor

or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or of any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

Petitioner was notified of the cost of the clerk's transcript on March 9, 1966, and of the cost of the reporter's transcript on March 14, 1966. From March 14, 1966 to November 16, 1966, a period of over eight months, he did not pay these costs or offer to do so. Rather, throughout this time he sought to have the State pay for his appeal. Petitioner met defeat on every step of the judicial ladder, based upon a long line of California cases which rule plainly and uniformly that there is no legal mode of requiring payment for a civil appeal out of the public treasury. See, e.g., *Agnew v. Contractor's Safety Association,* 216 Cal.App.2d 154, 156, 30 Cal.Rptr. 690, 691 (2nd Dist. 1963), hearing denied by the California Supreme Court July 10, 1963, cert. denied, 375 U.S. 976 (1964); *Rucker v. Superior Court,* 104 Cal. App. 683, 286 P. 732 (2nd Dist. 1930).

Furthermore, at no time during the pendency of his appeal did petitioner sufficiently establish that he was truly without funds, nor adequately show what efforts he had made to raise the sum which would enable him to comply with the rules. See, e.g., Application for Relief from Default in the District Court of Appeal, item No. 2 in the record filed herein by petitioner. This case thus is quite different from *Jeffers v. Screen Extras Guild,* 140 Cal.App.2d 604 (1956), cited by petitioner (p. 5). In *Jeffers,* in justification of his delay in making payment appellant showed in great detail his diligent efforts to

obtain funds for the transcripts. Petitioner made no such showing and utterly failed to establish the good cause required under California Rule of Court 45(e) for relief from default. The court below was undoubtedly influenced in this regard by the fact that no explanation of any kind accompanied petitioner's sudden offer to pay for the transcripts just as the appeal was about to be dismissed. (See Petition for Writ of Certiorari, p. 3) The circumstances of this last minute gesture naturally made highly suspect petitioner's earlier claims of indigence.

II. PETITIONER'S CONSTITUTIONAL ARGUMENT IS NOT TIMELY RAISED AND IS, IN ANY EVENT, WITHOUT MERIT.

Petitioner also argues that California deprived him of a constitutional right by refusing to pay for the record on appeal. This point, however, is not timely raised by the present petition seeking review of the dismissal of petitioner's appeal for non-compliance with the rules of court. The constitutional argument might properly have been urged on the original motion to be exempted from payment of costs on appeal. In fact, no such issue was set up by petitioner in his motion to the trial court, except as might be inferred from his citation without comment of *Griffin v. Illinois*, 351 U.S. 12 (1956). Upon renewing this motion in the District Court of Appeal, petitioner made no mention, by inference or otherwise, of any claimed federal right. Finally, in appealing to the California Supreme Court from the order denying the motion, petitioner for the first time made express reference to the Fourteenth Amendment. But in thus appealing,

petitioner chose the wrong avenue of review. No appeal lies from such an order, *Agnew v. Contractors' Safety Assn., supra,* and the California Supreme Court on August 16, 1966 denied the petition for a hearing. Rather, assuming *arguendo* that petitioner had not already waived his constitutional point by failing to present it distinctly in the first instance, his remedy at that juncture was to seek a writ of mandate to compel the trial court to allow him to perfect his appeal *in forma pauperis.* See *Kaufman v. Brown,* 106 Cal.App. 2d 686, 689, 235 P.2d 632, 634 (1951); *Rucker v. Superior Court, supra;* 3 Witkin, California Procedure 2533. Mandamus proceedings were not initiated, however, and petitioner should not be heard to assert Fourteenth Amendment issues at this late date.

In any event, petitioner's constitutional argument is wholly without merit. Reliance is placed on *Griffin v. Illinois,* 351 U.S. 12 (1956). That decision is inapplicable here, however, and not only for the obvious reason that *Griffin* was a criminal action involving radically different considerations of public policy and constitutional doctrine. *Griffin* is factually dissimilar to the present suit in two additional material respects. In that case, the state conceded that petitioners were indigent and that there were substantial errors in the trial court which would have entitled petitioners to a reversal. 351 U.S. at 13, 15. Here, petitioner has never made an adequate showing of actual indigence or of his attempts to obtain funds, and that failure stands as an independent basis for the decision below. Moreover, respondents definitely do not concede that any errors were made in the trial court. Indeed, a review of the Findings of Fact

and Conclusions of Law, printed in Appendix B hereto (pp. 26-29), shows that judgment in the instant case was based largely upon matters within the trial court's discretion and that reversible error is manifestly improbable. Withdrawal of petitioner's attorneys who tried the case further attests to the want of merit in the appeal. (See Petition for Writ of Certiorari, p. 2.)

It should be emphasized finally that in *Griffin* this Court did not hold that Illinois must always provide a stenographer's transcript where a defendant cannot buy it, even in criminal cases. In this regard, the Court ruled:

> "The Supreme Court [of Illinois] may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases."
>
> 351 U.S. at 20.

Former provisions dealing with bills of exceptions in California have been effectively superseded by Rule 7 of the California Rules of Court, printed in Appendix A hereto (pp. 18-20), which provides that an appellant may appeal in any case by a settled statement in lieu of both a reporter's and a clerk's transcript. See 3 Witkin, California Procedure 2319-24. Provision is made for filing by appellant of "a condensed statement in narrative form of all or such portions of the oral proceedings as he deems material to the determination of the points on appeal." Respondent may propose amendments thereto and the judge who tried the case, on noticed hearing, settles any differences between the parties. See *Estate of Wolper*,

146 Cal. App.2d 249, 303 P.2d 578 (1956). California has thus provided adequate and effective alternative means for appellate review of civil cases, a procedure available to petitioner, though rejected by him.

Conclusion

For the foregoing reasons, respondents respectfully urge that the Petition for Writ of Certiorari herein be denied.

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